

Does Retributivism Imply Vigilantism?

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Abstract

By "retributivism", I mean the view that it is sufficient to justify punishment to have the right sort of grounds to believe that it will give criminals the suffering they deserve for their actions. Under certain conditions, retributivism seems to imply vigilantism. Suppose that there is a "scrupulous vigilante" whose punishments track what criminals deserve for their actions precisely as well as the best courts, and who is always motivated by a sense of justice and never a desire for vengeance. Should retributivists accept that the scrupulous vigilante's punishments are as justified as those of the best courts? This presents retributivists with something of a dilemma. It may not be fatal for them to bite the bullet and accept that the scrupulous vigilante's punishments are justified, but this will probably raise concerns for those who accept retributivism because of its purported advantages in protecting criminals' rights. Retributivists can reject the claim that retributivism implies vigilantism if they accept that criminals deserve due process just as much as they deserve to suffer for their actions. But if we deserve due process, we deserve it no matter how we have acted. So if retributivists seek to incorporate desert of due process, they must redefine retributivism as a theory that respects not only action-based desert claims, but also desert claims based on something more abstract, such as citizenship or personhood. But it is not clear that such a broadened retributivism remains a kind of retributivism in any significant sense.

Introduction

By "retributivism", I mean the view that it is sufficient to justify punishment to have the right sort of grounds to believe that it will give criminals the suffering they deserve for their actions.¹ Retributivists typically acknowledge that punishing criminals probably has good effects on society, for example, by helping to deter crime. But they hold that these effects are merely fortunate side-effects of punishment, not part of what makes it just. In their eyes, even if punishment only served to make criminals suffer and had no good effects elsewhere in society, it would be no less justified.² This makes retributivism seem harsh, or even cruel, to some. But retributivism can appear to have an important advantage over other justifications of punishment when it comes to the protection of criminals' rights. That is, retributivism is not vulnerable to the charge of "using persons" in the way consequentialist justifications of punishment can be. For example, if we are utilitarians about punishment, that is, if we hold that punishment is just not because criminals deserve to be punished for their actions, but instead because it reduces overall suffering in society, then there is a sense in which we are using the people punished as tools that we manipulate in order to benefit society. If criminals have a right not to be used in this way,

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¹ Michael Moore is an influential proponent of retributivism in the recent literature. See e.g. *Placing Blame: A General Theory of the Criminal Law*, Oxford: Oxford University Press, 1997. (Some refer to this view as "pure retributivism", to contrast it with "mixed retributivist" views that combine consequentialist goals for punishment with retributive constraints on who can be punished, and how much they can be punished.)

² For purposes of this paper, I will assume that we can sensibly claim that criminals deserve to suffer for their actions. As I argue in [author's papers 1 and 2], it is doubtful that our grounds for believing the claims about free will implied by the claim that anyone deserves to suffer are strong enough. But I wish to object to retributivism on different grounds here.

then utilitarianism can be charged with endorsing violations of criminals' rights. Since retributivism does not count good effects on society as part of the justification of punishment, it avoids this charge. It is largely because of this advantage that retributivism has undergone a resurgence in the past few decades.

In this paper, I will discuss a worry about retributivism which has not yet, to the best of my knowledge, been the subject of a focused discussion in the literature. That is, retributivism seems to imply vigilantism under certain conditions. If this is right, it implies that retributivism cannot account for the right to due process under certain conditions. I do not take this implication to be fatal to retributivism. But it seems that a fair proportion of retributivists have been drawn to retributivism because of its apparent advantage when it comes to criminals' rights, and it is often thought that criminals have an unconditional right to due process. If retributivism cannot explain such a right, then this suggests that retributivism's advantage on the point of criminals' rights may not be as great as is sometimes assumed.

1. Retributivism and the Scrupulous Vigilante

Imagine that there is a "scrupulous vigilante" who roams about punishing people.

Suppose that she is scrupulous by virtue of her satisfaction of the following criteria:

- (1) she is epistemically scrupulous: the punishments she metes out "track" what criminals deserve for their actions precisely as well as the best courts (no better, and no worse).
- (2) she is morally scrupulous: she only punishes in cases where she has no personal attachments to the victims of the crime, and she has no vicious traits that might impugn her motivation (e.g. she is not excessively moved by anger and she has no sadistic streak).

Satisfaction of the first criterion means that we do not have to worry that the scrupulous vigilante will mete out punishments that do not fit the crimes—at least we do not have to worry any more about the vigilante than we do about the courts on this point. Satisfaction of the second criterion

means that we cannot dismiss the vigilante as merely vengeful, rather than properly retributive, in her actions.

Many will presumably feel that there is something wrong with vigilante punishment even when it comes to the scrupulous vigilante. It is not hard to account for this feeling if justified punishment must involve a fair trial before a jury of one's peers, the public presentation of evidence that meets a very high epistemic standard, the opportunity to confront one's accuser, and the other elements of what we have come to think of as due process. But the puzzle for retributivists is whether they can explain why justified punishment must involve due process. Many other views of punishment can go some way toward explaining this. Utilitarians can argue that the publicity involved in institutions of due process promotes deterrence, since it helps persuade the public that actual criminals are punished, rather than scapegoats, and it helps publicize the fact that punishments are in fact being meted out. Those who endorse communication theories of punishment can explain due process as necessary for the right sort of communication. Deontologists about criminals' rights can hold that criminals have an absolute right to due process irrespective of the deterrent or communicative effects of affording them this right. But if, as retributivists hold, it is sufficient to justify a punishment to have the right sort of grounds for the belief that it will give a criminal the suffering he deserves for his actions, then the scrupulous vigilante's punishments seem to be precisely as justified as those meted out by the best courts.

Can a retributivist bite the bullet and say that the scrupulous vigilante is as justified as the best courts, or should she deny this, and if so, how? I think this question presents something of a dilemma for retributivists.

It may be that retributivists can accept that the scrupulous vigilante is as justified as the best courts. Retributivists might explain the right to due process as conditioned on the assumption that vigilantes are not scrupulous. I think this is a mistake, but I will not argue in any detail for that claim here. For purposes of the present argument, I will accept that biting the bullet on this point may not be fatal to retributivism. But even in the absence of a conclusive argument against this resolution, it seems fair to claim that many have intuitions about justice which are in tension with this resolution, in particular, people who have accepted retributivism because they believe it protects criminals' rights in a specially absolute way. At the very least, accepting that retributivism sometimes implies vigilantism should probably be recognized as a dialectical disadvantage for retributivism. So I think that some retributivists will have misgivings about accepting this resolution.

It may seem that there is an obvious alternative available to retributivists who wish to maintain an unconditional right to due process. They can simply hold that criminals *deserve* to be afforded due process in all cases. Since retributivism is a view about treating criminals as they deserve to be treated, this might seem to make it easy to accommodate criminals' unconditional desert of due process. If we think that we have rights to whatever we can legitimately claim to deserve, then this approach might seem to provide an easy path to an unconditional right to due process.

I think it is correct that criminals deserve to be afforded due process in all cases, and that this implies an unconditional right to due process. But I do not think this point can easily be incorporated into retributivism. Recall that retributivism is a view about how just punishment gives criminals the suffering they deserve *for their actions*. In slightly different terms, retributivism is a view about making punishment fit *action-based* desert claims. But it is a

commonplace that criminals deserve to be accorded due process no matter what crimes they have committed—that is, no matter how they have acted. This suggests that we cannot understand criminals' desert of due process to be action-based.

Since retributivism, at least as defined here, is only concerned with action-based desert, it has no place for desert-claims which are not action-based. Some may object that this is a defect in how retributivism is defined here, not in retributivism itself, since retributivism can and must respect all legitimate desert-claims, not just the action-based ones. I will argue a bit later in the paper that it is not obvious that retributivism can be defined in this broader way. But first let me set out the notion of alternative desert-bases in more detail.

2. The Distinction between Personhood- and Action-Based Desert³

A desert base is whatever grounds a desert claim.⁴ Retributivists often seem to assume that all desert claims are action-based. This is not an absurd assumption to make, because the category of action-based desert claims is very broad. Desert claims about punishments, blame, reward, and praise are all typically based on actions, and desert claims about property are based on actions when construed in terms of the Lockean idea that one comes to deserve property when one "mixes one's labor" with objects.

But there are desert claims that cannot be supposed to be action-based. No matter how we have acted, we deserve certain kinds of treatment, for example, not to be used as mere means, to be given access to our rights, and to be afforded due process of law. This list of kinds of treatment can potentially be extended much further. If we deserve these things no matter how

³ Some of the remarks in this section are adapted from [author's paper 3].

⁴ Joel Feinberg's idea of *desert bases* is helpful here (Feinberg, 1963).⁴ Feinberg, J. 1963. "Justice and Personal Desert." In *Nomos VI: Justice*, ed. C.J. Friedrich and J.W. Chapman. New York: Atherton Press. Feinberg himself does not discuss personhood as a desert base.

we have acted, then referring to how we have acted can do nothing to ground our desert of these things, and this means that our desert of these things cannot be action-based. It must be based on something else.

How we understand this alternative desert-base may depend on our other commitments. For example, some may find it attractive to think that the legitimacy of these non-action-based desert claims is a function of citizenship in particular political societies. They might think that we can only claim to deserve to be treated in accordance with these non-action-based desert claims if our claims are directed to our fellow citizens in a society which recognizes such claims. I do not endorse this view. I will not argue against it here, however, because it cannot support a truly unconditional right to due process. That is, it might support a right to due process which is not conditioned on the unscrupulousness of vigilantes, but it conditions the right to due process on citizenship. Since the puzzle of this paper is whether retributivism can accommodate an unconditional right to due process, this approach is does not fit. It may turn out that there are reasons to be interested in an account of the right to due process that conditions it on citizenship but not on the unscrupulousness of vigilantes, but I will not explore them here.

For those who are open to a universalist account of desert claims not based on actions, there is a plausible and attractive alternative readily available. We can understand these desert claims as based on the mere fact of our personhood.⁵ The idea is that simply by virtue of being a person, there are certain kinds of treatment we can claim to deserve, among them being afforded an unconditional right to due process.

⁵ Fred Feldman also discusses this point, but not in the context of a critique of retributivism. 1995a. "Desert: Reconsideration of Some Received Wisdom." *Mind* 104.413 (1995): 63-77.

3. Can Retributivism Incorporate Personhood-Based Desert?

Can retributivists who wish to accommodate an unconditional right to due process do so by making room for personhood-based desert claims in their theory? This would of course require a different definition of retributivism—to keep things clear, let us call the new theory retributivism+. Retributivists hold that it is sufficient to justify punishment to have the right sort of grounds to believe that it will give criminals the suffering they deserve for their actions. But retributivists+ hold that this is not sufficient to justify punishment. Instead, retributivists+ hold that justified punishment requires good grounds to believe that it gives criminals what they deserve for their actions *and* what they deserve by virtue of being persons. I have no doubt that there is a viable view of punishment along these lines which looks something like this. The puzzle is whether retributivism+ is enough like retributivism to be considered a successor to retributivism in any significant sense. Once retributivists+ concede that there are personhood-based desert claims which constrain the imposition of deserved suffering, they have to show that these constraints are not so strong that resulting theory is not recognizable as a successor to retributivism.

If retributivists+ can show that the list of legitimate personhood-based desert claims is quite short, so that it includes claims to deserve due process and little else relevant to the imposition of suffering, then retributivism+ might turn out to be a recognizable successor to retributivism. But this strikes me as a difficult thing to show. At the very least, it would take some work. It does not strike me as implausible to suppose that we can make personhood-based desert claims that would, if incorporated into retributivism+, make it unrecognizable as a successor to retributivism. For example, it does not seem implausible to suppose that, just by virtue of being persons, criminals might deserve to be protected from suffering unless suffering

was (1) the best way to help them appreciate the wrongness of their actions, and thereby give them the possibility of making better choices in the future, or (2) a necessary side-effect of detaining them when we had the right sort of grounds for assuming them likely to commit violent crimes in the near future. But if retributivists+ accepted this claim, then retributivism+ would be better understood as a kind of consequentialism than as a successor to retributivism. That is, the imposition of suffering could only be justified as a means to, or a side-effect of, an altogether different end.

Retributivism+ could appeal to action-based desert claims as side-constraints that prevent the unjust imposition of suffering. For example, action-based desert claims could be used to explain why people who had not committed crimes but had traits that made them very likely to do so in the near future could not be made to suffer even if that was the best way to help them appreciate the wrongness of their very likely future actions. That is, retributivists+ could hold that people who have not committed crimes do not deserve to suffer based on their actions. Action-based desert claims could also explain why it would be wrong to impose intense and prolonged suffering on a shoplifter. That is, retributivists+ could hold that while he might deserve a bit of suffering for shoplifting, he does not deserve very much. But retributivist side-constraints do not make for a retributivist theory of punishment. They only restrict the means that can be legitimately used in pursuit of an end distinct from retribution.

4. Can a Retributivism Restricted to State Punishment Avoid the Vigilantism Objection?

Most people writing about punishment restrict their focus to punishment imposed by institutions of the state. If there is a philosophically well-grounded way to endorse retributivism only with respect to state-imposed punishment, then that might allow retributivists to avoid the

vigilantism objection. But it is not clear to me how this would work. I will briefly consider two arguments along these lines.

(a) Retributivists have sometimes offered semantic arguments to defend their view.⁶ Some might argue that "punishment" means penalties meted out by the state, so in adopting a theory of punishment, one is only adopting a view about penalties meted out by the state. There are at least two problems here. First, it conflicts with the usage of "punishment". We apply it without confusion or hesitation to hard treatment by the state as well as hard treatment by vigilantes (both unscrupulous and scrupulous). So in the absence of some evidence that we are deftly switching senses without noticing it, we should assume that it means the same thing. Second, even if it is true, it is not clear how it helps. Suppose that we accept the point that the hard treatment meted out by the scrupulous vigilante is not punishment, but rather an analogue of punishment. If the justification which retributivists offer for hard treatment by the state applies just as well to hard treatment by scrupulous vigilantes, then it is not clear how this point helps retributivists avoid endorsing scrupulous vigilantism.

(b) Some who have written on desert emphasize a distinction between pre-institutional and post-institutional desert.⁷ The idea is that people who consent to membership in rule-governed societies can come to deserve particular kinds of treatment by virtue of following or failing to follow institutional rules—kinds of treatment that they could not be claimed to deserve in the absence of their membership in these rule-governed societies. Legitimate post-institutional desert claims only come into being as the "output" of the deliberations of social

⁶ In the analytic literature, this strategy goes back at least to Antony Flew's paper "The Justification of Punishment," (*Philosophy* 29: 1954).

⁷ Rawls is a prominent example. See e.g. section 17 of *A Theory of Justice, Revised Edition* (Harvard Belknap: Cambridge, MA, 1999.)

institutions. Can the vigilantism objection be avoided by a post-institutional retributivism, which holds that there is simply no way to determine what criminals deserve for their actions until rule-governed penal institutions determine the appropriate penalty?

There are at least two problems here as well. First, taking a post-institutional approach to deserved punishment may be a sensible strategy for some justifications of punishment, but it seems to fit retributivism poorly. There are some conceptions of the goal of punishment that arguably turn out to be highly (as it were) institutionally embedded. For example, some theorists hold that the purpose of punishment is to create the largest possible spheres of free action for all the citizens in society. In other words, the purpose of punishment is to create obstacles to invasions of agents' spheres of free action by other agents, and punishment must be carefully calibrated to afford all agents the largest mutually consistent spheres of free action possible. When we explain the goal of punishment in such an abstract way, the details of justified punishment may depend in complex ways on the structure of social institutions, since the kinds of actions that agents want to be free to perform may depend in complex ways on the structure of social institutions. If we accept this view of what justifies punishment, it might make a lot of sense to hold that, apart from social institutions, there is no way to determine what criminals deserve.

It makes much less sense for retributivists to take this approach. Retributivism does not seem to be institutionally embedded in the way the freedom-maximization justification is. The claim that we must appeal to social institutions to determine what criminals deserve for their actions seems to clash with the intuitions about action-based desert which attract many theorists to retributivism in the first place. That is, retributivism is typically thought to be supported by strong commonsense intuitions about the degrees of severity of various kinds of crimes, and the

kinds of penalties which constitute appropriate proportional responses to these kinds of crimes. Retributivism is typically thought to stand in marked contrast to other justifications of punishment in this respect. In fact, the notion that highly structured retributive intuitions about severity and proportionality are part of common sense is so powerful that opponents of retributivism typically concede that that these intuitions exist and turn to some kind of error theory to explain them. It seems odd to suppose that these commonsense intuitions support retributivism, but also to hold that legitimate claims about deserved punishment only exist as the output of social institutions.

The second problem with the idea that a post-institutional retributivism avoids the vigilantism objection is that this strategy seems merely to push the problem back one level. Suppose we can be certain that the best court in our society would have imposed a particular punishment on someone had it not been for a technical paperwork error on the part of the prosecutor (for example, a missed deadline). Suppose further that, despite the happiness of the defense attorney and the defendant about this error, even they concede that it does not bear in any way on the legal or moral substance of the case. Should retributivists endorse the scrupulous vigilante's imposition of a punishment of precisely equal seriousness? Since we can be certain what punishment the court would have imposed absent a merely technical error, there is no longer a problem about determining what the criminal deserves. Either retributivists must endorse the scrupulous vigilante's punishment, or they must explain why they do not. To explain why they do not, they must find an alternative to action-based desert claims, and I can see no alternative more attractive than criminals' claim to deserve due process just by virtue of being persons.

Conclusion

If the arguments just made are correct, then the vigilantism objection presents retributivists with something of a dilemma. If they accept that retributivism implies vigilantism, then they concede that retributivism cannot accommodate an unconditional right to due process. This should be a cause for concern to those who endorse retributivism because of its purported advantages in protecting criminals' rights. If they do not accept that retributivism implies vigilantism, then they must accept that, in addition to action-based desert claims, there are also legitimate desert-claims based on something more abstract—citizenship, or, as I have suggested here, personhood. But once retributivists have opened the door to this additional set of desert claims, it is not obvious that their new theory remains a kind of retributivism in any significant sense. Showing that it does may be a difficult task.